IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922—No. 165.

BLAMBERG BROTHERS,

Appellant,

—against—

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

Statement.

Counsel for the United States having obtained leave to file a supplemental brief in the case of *United States* v. *Carver* (No. 402), this appellant asked and was granted the privilege of filing a supplemental brief within three days after the filing of the Government's supplemental brief in the *Carver* case.

The Government's reply brief in the *Carver* case sets forth three possible interpretations of the Suits in Admiralty Act, which we will discuss in the order in which they appear in the Government's reply brief.

POINTS.

I.

The first construction suggested by the Government does violence to the language of the Act under discussion. It gives no effect to the words "in view of the provision herein made for libel *in personam*." These words clearly show that the remedy provided in the second section of the Act was to be co-extensive with the rights of which suitors were deprived by the first section of the Act. In view of these words it is impossible to construe the Act as leaving claimants without remedy in cases where their sole right, if the vessel were privately owned, would have been *in rem*.

The Government's suggested construction is equally inconsistent with the language of Mr. Campbell, before the Senate Committee on Commerce, quoted on page 3 of the Government's brief. After illustrating his remarks by mentioning the case of a ship which is in collision while in charge of a compulsory pilot, Mr. Campbell said:

> "While I am prohibiting actions *in rem*, I am giving the litigants exactly the same rights as if they had proceeded *in rem*."

The liability of a vessel and the non-liability of her owners, for damage done while the vessel is in charge of a compulsory pilot, has been clearly explained by this Court. *The China*, 7 Wallace (U. S.) 53; *Homer Ramsdell Transportation Co.* v. *La Compagnie Generale Transatlantique*, 182 U. S. 406. When considered in con-

nection with these cases, Mr. Campbell's remarks afford the clearest possible evidence that he understood the Act under discussion as affording a remedy for claims which were solely *in rem* as well as for claims which could be enforced either *in rem* or *in personam* at the option of the claimant.

Since the argument of this case the Circuit Court of Appeals for the Third Circuit has affirmed the decision of Judge Dickinson in the case of *United States* v. *Phoenix Paint & Varnish Company*, referred to in this appellant's principal brief (pages 11, 12, 43). We take the liberty of printing the opinion of the Circuit Court of Appeals as an appendix to this brief, as it seems to us squarely contrary to the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Cunard Steamship Company* v. *United States*, which is printed as an appendix to the principal brief for the Government in the present case. We call the Court's attention to the fact that in the *Phoenix Paint & Varnish Company* case the suits were instituted by libels *in personam* and prosecuted as if *in rem*. Neither in the opinion of the District Court, nor in the opinion of the Circuit Court of Appeals does it appear where the vessels were, against which the liens were asserted, or even that they were still in existence.

II.

The Government's argument in opposition to the second construction considered in its brief, is based entirely on certain inconveniences to which, it is suggested, the Government might be subjected under this construction. The principal

point made in this connection is that a private owner, who is not personally liable, need not have recourse to the Limitation Statute, but may simply abandon his vessel to the lienors. Although this is doubtless true, we think it is unimportant. Under the Limitation Act of 1851, the rights of the shipowner and the damage claimants are fixed as of the end of the voyage on which the damage occurred. At this point the Government has precisely the same rights as a private owner. At this time the owner has in his possession the precise value which he is required to surrender. Subsequent fluctuations in the value of the vessel, while they may be of great practical importance, cannot give rise to any real difference in principle between the liability of the Government and the liability of a private owner. At the end of a voyage on which damage has occurred, the Government may limit its liability. If suit is promptly brought against the vessel, limitation may be had under the Act of 1851; if suit is not brought promptly, the Government may secure a practical limitation by converting its interest in the vessel into cash and holding this sum as security for future claims. If it chooses to continue to own and operate the vessel, her subsequent decline in value merely represents the fruit of an unfortunate investment, and has no necessary or logical connection with the extent of the owner's liability on a previous voyage. From the standpoint of natural justice, there is certainly no inequity in making an owner responsible to the extent of the value which he pledges, or permits others to pledge, for the prosecution of a particular voyage.

So far as the Government relies upon the bare fact that the position of the Government under

the suits in Admiralty Act may, in certain events, be less favorable than that of a private owner, we think the answer is that this disadvantage is a necessary concomitant of the corresponding advantage secured to the Government under the Act. In the case of a private owner, the lienor may secure himself against any decline in the value of the vessel by having her attached and sold (or bonded) at the end of the voyage on which his claim arose. Under the suits in Admiralty Act, the lienor is deprived of this remedy in the case of Government ships. It is, therefore, to be expected that the protection which the lienor can no longer secure for himself will be afforded to him by the terms of the act; and this we contend is the effect of the Act as properly construed. The Act gives the Government the right to continue the operation of its vessels without interference by lienors; but any subsequent decline in the value of the vessel is for the account of the owner and does not concern the lienors, who have been deprived of their right to have the value of the vessel converted into cash or have security presently given for the amount of this value.

The foregoing construction of the act is supported by the examples given in the Government's reply brief. It is incredible that a vessel worth One Million dollars would be permitted, under private ownership, to continue in operation after valid maritime liens had been incurred in excess of her value. Such a result is only possible where the vessel is exempt from seizure and lienors have no power to enforce their claims against her.

Counsel for the Government also comment on certain inconveniences arising out of the lack of uniformity in the limitation laws of the various

maritime countries. This inconvenience exists in the case of private shipowners as well as in the case of Government vessels. The differences in the limitation laws of different countries, and the different situations which may arise under them, afford an endless field for discussion and argument. We feel, however, that such argument would be inappropriate in this case, in view of the fact that the entire subject matter of limitation has only a collateral bearing on the interpretation of the Suits in Admiralty Act; and we think that counsel for the Government have already pursued this line of argument to a point where its bearing on the issues involved in the present case is very remote.

III.

The third interpretation of the Suits in Admiralty Act suggested by the Government is interesting, but is admittedly unsupported by the language of the Act. Counsel for this appellant assume that this Court will not, either in the present case or in the *Carver* case, find it necessary to determine to what extent and in what manner the Government may limit its liability under the Suits in Admiralty Act. No question of limitation is involved in either of these pending cases and we, therefore, do not feel at liberty to argue the various questions of limitation suggested in the Government's brief. The question of limitation of liability comes into the present case only as bearing on the application of the suits in Admiralty Act to claims for which the Government would not be liable *in personam* if it were a private owner. Confining ourselves to this aspect of the case, we will only point out

that while the Government's third suggested interpretation is less inconsistent with the language of the suits in Admiralty Act than the interpretation first suggested, it produces a result which is highly unjust to lienors, for the reasons set forth in our discussion of the Government's second suggested interpretation. We respectfully submit that the second interpretation suggested by the Government is the only natural and logical interpretation of the Act, and that this interpretation does not produce any absurdity or injustice (in the matter of Limitation of Liability, or otherwise) which should lead to its rejection.

December 12, 1922.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
JAMES W. RYAN,
J. EDWARD TYLER, JR.,
Counsel for Appellant.

Appendix.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

UNITED STATES OF AMERICA, Owner of the Steamship "ANNA E. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2865. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "COLIN H. LIVINGSTONE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2866. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "JENNIE R. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2867. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "E. A. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2868. October Term, 1922.

UNITED STATES OF AMERICA, Owner of the Steamship "H. F. MORSE",
Respondent-Appellant,

—against—

NORRIS E. HENDERSON, JOHN D. BOYCE and WILLIAM W. HODGSON, trading as PHOENIX PAINT & VARNISH COMPANY,
Libellants-Appellees.

No. 2869. October Term, 1922.

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before:—BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges*.

WOOLLEY, *Circuit Judge*:

These actions were brought by the Phoenix Paint and Varnish Company, a co-partnership, against the United States of America, as owner of the several ships named in the caption, for supplies furnished them while being operated by the United States Transport Co., Inc. They were instituted by libels *in personam* and prosecuted, as if *in rem*, in the manner provided by the Suits in Admiralty Act of March 9, 1920, 41 Stat., Chapter 95, page 525, exempting vessels owned by the United States and its agencies from seizure in admiralty causes. As they arose out of the same facts and involve the same questions of law we shall dispose of them in one opinion.

The actions were founded on the Act of June 23, 1920 (36 Stat., Chapter 373, page 604, Comp.

St. 1913, Sec. 7783-7787), as re-enacted in the Merchant Marine Act of June 5, 1920, 41 Stat., page 988, Chapter 250, Sec. 30, Sub-sections P, Q, R, S and T. At the trial the libellants introduced evidence that they had furnished supplies to five ships owned by the United States and in the operation of the United States Transport Company, and maintained that the United States Transport Company was, within the terms of the statute, the "person to whom the management of the (vessels) at the port of supply (had been) entrusted" and as such was "presumed to have authority from the owner to procure" supplies and necessaries. *The Yankee,* 233 Fed. 919; *The Penn,* 273 Fed. 990. In defense, the United States introduced a number of contracts of confusing details covering the building of the ships by the Virginia Shipbuilding Corporation, the financing of their construction by the United States Shipping Board Emergency Fleet Corporation the adjustment of disputes, conveyance of title of the ships to the United States of America, delivery thereafter to the United States Transport Company for operation pending a proposed sale to the Shipbuilding Corporation, on which it (the United States) based the contention, not exactly that it was not the owner of the ships for which the supplies had been furnished, for the title papers were against this position, but that the Transport Company was operating the ships not for it but for the Virginia Shipbuilding Corporation. The issue was so framed that, on facts to be mentioned presently, a finding that the ships were operated for the United States would sustain the libels, or a finding that they were operated for the Virginia Shipbuilding Corporation would defeat the libels. The District Court found against the United States and

entered decrees for the libellants. The cases are here on the respondent's appeals.

In reviewing the complicated facts of these cases it should be understood that they are not actions between the United States, the United States Shipping Board Emergency Fleet Corporation, the United States Shipping Board, the Virginia Shipbuilding Corporation, the United States Transport Co., Inc., or any of them, arising out of contracts for building ships and advancing money. They are simple actions in admiralty brought against the United States by one furnishing its ships with supplies. Also, it should be noted that the libellants at the time they furnished the supplies were wholly uninformed of the situation between the United States and its several agencies. They came on the scene as strangers. Still another matter of importance is to determine at what point in this complicated controversy we should enter in order to find and follow the issue raised by the libellants. The proctors for the United States began at the first historical stage of the transactions between the Emergency Fleet Corporation and the Virginia Shipbuilding Corporation and followed them down into and through the litigation. This chronological order perhaps has advantages, but it tends to add to the confusion by placing the libellants in company with a group of corporations at a time and under circumstances with which they had nothing to do. Therefore, having in mind that the libellants brought these suits in admiralty under a statute enacted specially for the protection of persons in their situation, we think the place at which to start is where the libellants started and where also the law starts.

The libellants began by furnishing supplies, concededly necessaries, to five ships in the opera-

tion of the United States Transport Company, upon its order, made with authority from the owner, presumed by statute, to procure the supplies on the credit of the ships. It cannot be questioned that, upon the face of this transaction so far as it has been stated, the libellants had a right to assume that the Transport Company was the person to whose management, within the terms of the statute, the ships had been entrusted at the port of supply, and that, as such, it was clothed with authority by the owner to procure supplies, under a presumption which the law, in its modern policy, makes in favor of the person furnishing them. But the law goes farther and provides that, notwithstanding this liberal provision for one furnishing supplies, it shall not "be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies or other necessaries was without authority to bind the vessel therefor." Thus, speaking broadly, the law presumes the owner's authority in one entrusted with a ship to procure supplies on the pledge of the ship, unless the owner has withheld his authority and the furnisher knew it or by diligence could have ascertained it. *The Havana*, 63 Fed. 496; *The Yankee*, 233 Fed. 919; *The Oceana*, 244 Fed. 80; Certiorari denied, see *Morse Dry Dock & Repair Co.* v. *Conron Co.*, 245 U. S. 656; *The Dana*, 271 Fed. 356; *Northwestern* v. *Dunkley*, 174 Fed. 121; *The Valencia*, 165 U. S. 264; *The Kate*, 164 U. S. 458; *The Huron*, 271 Fed. 781. The exception to the remedy which the law affords one furnishing supplies is operative only when by reason of some circumstance he either knew or by diligence could have ascertained that the person ordering the

supplies was without the authority of the owner which otherwise the law presumes. The United States urges, quite correctly we think, there is in these cases one such circumstance which, at the threshold, imposed upon the libellants the duty of inquiry. It was a letter dated March 30, 1920, written by the Transport Company to the libellants, out of which grew the order for supplies. The material parts are as follows:

> "We desire to know whether you wish to furnish us with list prices of paint for vessels under our operation. Part of this fleet are U. S. Shipping Board vessels and part belonging directly to this Company. Upon the vessels belonging to the Shipping Board, payment for their bills will be prompt, that is, within approximately ten to fifteen days: upon vessels owned directly by us it will be slower, credit of possibly sixty days in some cases."

Clearly this was notice to the libellants diligently to ascertain whether the Transport Company, "because of a charter party, agreement for sale of the vessel, or for any other reason, was without authority to bind the (vessels)" of the United States Shipping Board for the supplies it was about to order. The libellants made no such inquiry. This was a mistake. But the matter can not stop here for the next question is, what would they have found if they had inquired? This: They would have found a contract between the United States of America, "represented by the United States Shipping Board Emergency Fleet Corporation" on the one part, and the United States Transport Co., Inc., on the other part, bearing date the thirteenth day of March, 1920, and known as agency contract MO3. This contract was entered into only a few days before the quoted letter from the Transport Company

putting the libellants on inquiry. If they had read it, the libellants would have found that therein the United States described itself as "owner of certain vessels" and the Transport Company as "managing agent;" that the Fleet Corporation appointed the Transport Company "its agent for the management, operating, and conduct of the business of such vessels as it has assigned and may assign to" it; that the Transport Company, "The Agent," agreed to provide and pay for all provisions, equipment and supplies, perform all customary duties of a managing and operating owner of the vessels, collect all freights and moneys arising out of their management and operation and deposit the same on behalf of the Emergency Fleet Corporation as a separate trust fund in the name of that corporation; and that the Transport Company "shall be paid an agent's fee, and a commission, as stated."

In searching this contract for lack of authority on the part of the Transport Company to procure supplies on the credit of ships assigned to it, the libellants would have found no provision whereby the United States, as owner, had withheld authority from the Transport Company to procure supplies for the ships it had entrusted to its management. Therefore, at this stage the Transport Company remained vested with authority presumed by the law to order supplies upon the credit of the ships, Act of June 5, 1920, Sec. 30, Sub-sections Q and R, 41 Stat. 1005; *The South Coast*, 251 U. S. 319; *The Bronx*, 246 Fed. 809; *The Dana*, 271 Fed. 356; and the libellants had a right to furnish the supplies upon the credit of the ships—if the ships for which the supplies were furnished were actually of the number assigned, or to be assigned, under the contract. In identifying the ships in question

with those of the contract of agency the libellants, had they inquired, would have found that the Transport Company had received the five ships here in litigation and in return had given the Emergency Fleet Corporation "delivery receipts," indicating that it had received the several ships and had entered them "under the terms and conditions of the Agency Agreement for Managing and Operating Steel Cargo Vessels * * * (pending purchase) * * *, said agreement having been executed March 13, 1920." But these receipts did more than identify the ships as of the number embraced within the MO3 agency contract. It told them that the ships were accepted by the Transport Company for operation "pending purchase." What purchase? Here, obviously, was another circumstance which imposed upon the libellants the duty under the statute to examine farther into the Transport Company's authority to bind the ships or hold the owner for supplies. This the libellants failed to do; but if they had done it, what would they have found? They would have found a confusion of transactions involving war shipbuilding and financing. These transactions we shall give only in outline, bringing into view only such parts as bear on the title of the ships here in question. They are these:

During the war the United States Shipping Board Emergency Fleet Corporation entered into a contract with the Virginia Shipbuilding Corporation for the construction of twelve ships by the latter concern mainly with moneys to be advanced by the former. The end of the war found the ships in various stages of incompletion and the Shipbuilding Corporation indebted to the Fleet Corporation in something over $12,000,000. With the need of more money with which to complete the ships, arrangements were entered into

whereby the Fleet Corporation promised to make further advance. This is where the trouble began.

These re-financing transactions were covered by two contracts. The first, bearing date September 25, 1919, was between the Virginia Shipbuilding Corporation and the United States Shipping Board Emergency Fleet Corporation and the United States Shipping Board, the latter two parties "representing the United States of America." This agreement is entitled "Adjustment Agreement to be attached to contract No. 145 SC," the original contract for the construction of the ships. As the original contract is not in the record we assume it would have given the libellants no information if they had examined it. If, however, they had examined the Adjustment Agreement of September 25, 1919, they would have found that the Shipbuilding Corporation, under its original contract, had been and still was engaged in constructing ships for the Fleet Corporation; that it needed money with which to complete them and demanded money in adjustment of certain differences arising out of the original contract; that to this end a sum was allowed by the Fleet Corporation and accepted by the Shipbuilding Corporation; that to pay off its indebtedness to the Fleet Corporation the Shipbuilding Corporation agreed to purchase and the United States Shipping Board *to sell* three ships then completed and five ships then under construction at the price of $225 per D.W.T. less certain credits, net earnings of the ships when put in commission to be applied to payment on the purchase price; and that when the "closing dates" arrive, the parties *would enter* into contracts *of sale*, the terms of which "shall be the same as under the present Standard Form of Purchase Agreement and Mortgage adopted by the Shipping Board."

This reference to the standard form of purchase agreement adopted by the Shipping Board as the terms of the proposed contracts of sale ultimately to be entered into under the agreement of September 25, 1919, might, perhaps, have been notice to the libellants to travel still farther into the transactions between these several governmental agencies and ascertain if there were anything there affecting their right to furnish supplies on the credit of the ships. If they had procured a copy of this standard form of purchase agreement and had examined it they would have discovered that it contained the very thing which, if acted upon, would have annulled their right to libel the ships for supplies, or to proceed, as in these cases, against the owner *in personam*. This is a provision in the standard form of agreement, being Section 6, Sub-section f, which reads as follows:

> "From the time of delivery by the seller of the bill of sale of said vessel, and until the payment in full of the notes to be given the buyer, and until the performance of all other obligations of the buyer hereunder, the buyer agrees * * *, that the buyer's right, title and interest in said vessel is subject to said mortgage and to this agreement, and that the buyer has no right, power or authority to suffer or permit to be imposed on or against said vessel any liens or claims which might be deemed superior to, or a charge against, the interest of the seller in said vessel."

On this undertaking by a buyer of a ship, after receiving bill of sale, to protect the mortgage on the ship against superior liens mainly rests the case of the United States. It contends that here the owner clearly withheld authority from the agent to bind the ships for supplies. But the

trouble with this contention is that the cited provision in the standard form of purchase agreement never became operative because the Shipping Board and the Virginia Shipbuilding Corporation never executed agreements containing such provisions, that is, the Shipping Board has not sold the ships to the Shipbuilding Corporation, and, in consequence, has not given it bills of sale, and the Shipbuilding Corporation has not paid for or acquired the ships under this or any form of agreement of purchase. Therefore, if the libellants, in running down the history of the ships, had encountered this standard form of purchase agreement it would, unsigned, have told them nothing to defeat their remedy under the statute.

There remains another paper in the case, being the second re-financing contract, bearing date July 19, 1920, between the Virginia Shipbuilding Corporation of the one part and the United States Shipping Board Emergency Fleet Corporation and the United States Shipping Board, representing the United States of America, of the other part. Without repeating the matters which moved the parties, this agreement provides *inter alia* that the Shipbuilding Corporation shall reconvey unto the United States of America the Steamships "Vanada" and "H. F. Morse" (the latter being one of the ships here in question) and that the title to hulls 1, 2, 5, 6, 7, 9 and 10 (in which are included four of the ships here in question) are thereby transferred and conveyed to the United States of America. Provision was made for the use of net ship revenues in the completion of the remaining hulls pending their contemplated purchase.

If the libellants had examined the contract of July 19, 1920, they would have found that the

title to the "H. F. Morse" was to be conveyed to the United States of America (which was done on September 22, 1920), and that by the agreement itself the title of each of the four remaining ships was conveyed to the United States of America, and that, so far as is shown, there the title remained at the time the libellants brought these actions and still remains. In other words, these transactions, disentangled from details, would have disclosed to the libellants several things: First, title of the ships in the United States of America at the time it turned them over to the Transport Company for operation under the agency agreement MO3, at the time the supplies were furnished, and at the time these actions were brought; second, an outstanding executory contract to sell the ships to the Virginia Shipbuilding Corporation, clearly distinguished from a contract of sale, *White* v. *Treat*, 100 Fed. 290; *Hammer* v. *United States*, 249 Fed. 356; Third, that the Virginia Shipbuilding Corporation had not purchased the ships under the contract, and, for that matter, may never purchase them; and fourth, that there is no provision in any of the completed transactions withholding from the Transport Company authority to purchase supplies upon the credit of the ships. Hence there was nothing open to discovery by the libellants on inquiry which shows that the Transport Company, "the person ordering the * * * supplies * * * was without authority to bind the (vessels) therefor." It follows that the libellants can maintain their libels *in personam*.

The decrees below are affirmed.